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AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 539

Case No. 556: BENTALEB

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Roger Pinto, President; Mr. Jerome Ackerman, First Vice-President; Mr. Ahmed Osman, Second Vice-President;

Whereas at the request of Mokhtar Bentaleb, a staff member of the United Nations, the Tribunal extended to 1 May 1990 the time-limit for the filing of an application to the Tribunal;

Whereas the President of the Tribunal, with the agreement of the Respondent, further extended such time-limit to 1 July 1990;

Whereas, on 29 June 1990, the Applicant filed an application containing the following pleas:

"II. Pleas

10. The Applicant respectfully request the Administrative Tribunal:

(a) To order, as a preliminary measure, the production of the report of the 1986 internal Promotion Panel of the Department of Technical Co-operation to the Under-Secretary-General of the Department (...).

(b) To find that the failure of the Administration to provide the Applicant with a performance evaluation report in time for the 1986 P-5 promotion exercise violated his contractual rights and seriously impaired his prospects for promotion.

(c) To find that the report of the Panel on Discrimination and Other Grievances in the Applicant's case was not given the required further consideration and eventual disposition by the Office for Human Resources Management, giving rise to a serious obligation on the part of the Administration to provide a prompt and effective remedy for the unfair and discriminatory treatment which the Applicant had suffered.

(d) To find that the Administration failed to fulfill the above obligation and, in fact, acted contrary to it.

(e) To decide that the Applicant's name be added to the 1986 P-5 Promotion Register and that his promotion be implemented retroactively as of 1986.

(f) To award to the Applicant damages and compensation in the amount of two years' net base salary."

Whereas the Respondent filed his answer on 27 August 1990;

Whereas the Applicant filed written observations on 28 September 1990;

Whereas the Applicant submitted an additional written statement and an additional document on 7 October 1991;

Whereas, on 15 October 1991, the Applicant withdrew his preliminary plea and submitted the document referred to therein;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 1 November 1971 and served under a succession of fixed-term appointments until 1 July 1973, when he received a probationary appointment at the P-2 level as an Associate Administrative Officer in the Training Service of the Office of Personnel Services. On 1 April 1974 he was granted a permanent appointment and promoted to the P-3 level as Administrative Officer. On 1 February 1977 the Applicant was reassigned as Recruitment Officer to the Technical Assistance Recruitment Service, Division of Recruitment. On 1 July 1977 he was promoted to the P-4 level and, on 1 July 1978, he was transferred to the Technical Assistance Recruitment and Administration Service, Department of Technical Co-operation for Development (TARAS/DTCD).

On 3 February 1986 the Assistant Secretary-General for Personnel Services initiated the 1986 promotion exercise by a memorandum in which he

requested all Heads of Departments and Offices to submit their recommendations for consideration by the Appointment and Promotion Board and its subsidiary bodies. Under paragraph 2 of the memorandum, Departments and Offices were required to ensure the existence of suitable procedures to conduct their internal promotion review in a fair and objective manner for the purpose of establishing the departmental list. Under paragraph 6, they were asked to ensure that all performance evaluation reports which were already due had been completed for all staff members in accordance with Administrative Instruction ST/AI/240/Rev.2 irrespective of whether or not those staff members were being recommended for promotion. Under paragraph 12, all recommendations for promotion were to be accompanied by "specific information as to whether or not a post will be available within the register year and, to the extent possible, an indication of the post number."

On 28 August 1986, in a memorandum addressed to the Under-Secretary-General of DTCD, the Director of the Programme Support Division (PSD), of which TARAS was a part, stated that on the advice of the Chief of TARAS, he had recommended the Applicant for a promotion to the post vacated by the Chief of Unit II of TARAS; the Departmental Panel, however, had suggested the transfer of a P-5 staff member of another Division - Mr. Argyriades - to that post and the Applicant felt that such a move would hurt his career advancement; in view of the negative effect that the transfer would have on the morale of a deserving staff member and possibly on other staff in TARAS, the Director of PSD requested the Under-Secretary-General to review the recommendations of the Departmental Panel in that particular case. On 1 September 1986 the Applicant was designated Officer-in-Charge of Unit II of TARAS. On 2 September 1986 he brought the issue of his promotion to the consideration of the Under-Secretary-General of DTCD in a memorandum in which he stated inter alia:

> "...
>
> 9) I was very distressed to learn upon my return from home leave and official mission that the DTCD Panel on promotion has not submitted - for your approval - my name for promotion. I understand that the Panel has instead recommended that this post (...) should be

given to another staff member. I wonder whether it is within the mandate of the Panel to recommend transfers instead of considering each case up for promotion on its own merit.

10) As the result of this unusual recommendation of the Panel (and since no P-5 post has been abolished) I would thus be denied promotion after almost ten years of dedicated work as a recruitment officer with TARAS.

11) I am convinced that the DTCD Panel on promotion, in its recommendations, has been very unfair to me; by simply recommending a transfer of personnel it has done great injustice to me.

..."

On 14 January 1987 a circular memorandum issued by the Under-Secretary-General of DTCD listed, among other redeployments effective immediately, the reassignment of Mr. Argyriades to TARAS. On 12 February 1987 the Applicant stated his claim for promotion in a memorandum addressed to the Chairman of the Appointment and Promotion Board.

On 13 February 1987 the Applicant wrote to the Executive Officer of DTCD drawing his attention to the fact that he had not had any periodic report since 30 June 1982. A periodic report covering the period 1 July 1982-31 January 1987 was accordingly prepared in March 1987 and the Applicant signed it on 19 June 1987.

On 19 February 1987 the Assistant Secretary-General for Human Resources Management sent "Guidelines for the appointment and promotion bodies" to the Chairman of the Appointment and Promotion Board. Paragraph (B) of section II of the Guidelines read:

"(B) Availability of posts

As in previous years, the following criteria should be observed in considering staff members for promotion:

- the functions of the post in question must be classified at the appropriate level;

- there must also be a budgeted post available for implementation of the promotion during the promotion year. Should it be necessary to clarify the status of a post, the Ex-Officio member, after

> consultations with the Department concerned and the Budget Division, will confirm to the Board whether or not the post is available for promotion."

On 7 April 1987 Mr. Argyriades was designated Deputy Chief of TARAS and a few weeks later the Applicant's service as Officer-in-Charge of Unit II of TARAS came to an end. On 17 June 1987 the 1986 Senior Officer (P-5) Promotion Register, which had been approved by the Secretary-General, was issued. The Applicant's name was not included in the Register.

In the meantime, the Applicant had, on 13 May 1987, brought the issue of his promotion to the attention of the Panel on Discrimination and Other Grievances (Panel on Discrimination), charging DTCD with a discriminatory attitude towards his case. On 12 November 1987 the Panel on Discrimination submitted its report to the Assistant Secretary-General for Human Resources Management. In its report, the Panel on Discrimination concluded that the Departmental Panel had acted unfairly in recommending the transfer of a staff member from another division to fill the vacant post, thus preventing the promotion of the Applicant, whose suitability for promotion had been clearly demonstrated by his performance record. The Panel on Discrimination recommended that the Applicant be considered for promotion immediately to a P-5 post within his Department or, if that was not possible, that he be redeployed or transferred to a suitable P-5 post in another Department of the Secretariat. On 24 December 1987 the Assistant Secretary-General for Human Resources Management forwarded the report of the Panel on Discrimination to the Under-Secretary-General of DTCD who, on 10 March 1988, sent him the following comments:

> "...
>
> 3. The first point raised in the report concerns the fact that Mr. Bentaleb was not recommended by the Department for promotion for P-5, even though he was internally recommended by the Director of his Division. We fail to see the point here, since Mr. Bentaleb's situation is identical to that of quite a few staff members of the Department (and surely of a large number of staff in the Secretariat as a whole) who, though recommended by their immediate supervisors or Directors remain nevertheless unrecommended by their Departments. To be exact, 14 P-4 staff in DTCD were recommended by their respective

Directors for promotion to P-5 in the promotion year under question (1986), against a total of 6 (six) available posts; the 8 staff who were not selected also had long seniority and meritorious performance, but obviously not all could have possibly been selected for Departmental recommendation due to the non-availability of posts.

4. In saying or implying that the Department had to recommend Mr. Bentaleb, the Panel takes the liberty to substitute its judgement for that of two promotion reviewing bodies, namely - the internal departmental review panel and then the APB [Appointment and Promotion Board]. As to the internal promotion panel, it comprised duly elected staff representatives and conducted its review in a most fair and thorough manner. In fact, the panel reviewed all staff for all posts, i.e. - Mr. Bentaleb was reviewed not only for the post in his immediate unit, but also for other P-5 posts in the Department. The fact is that the Panel selected other staff and I saw no reason not to accept their recommendations. Subsequently, the APB had the possibility of overruling the Department, so to speak, by including Mr. Bentaleb in the Promotion Register in lieu of one of our other recommendees. Indeed, the APB did just that in the case of two other of the Department's recommendees, but not in the case of Mr. Bentaleb. In other words - both the internal promotion review panel and the APB considered other staff to be more meritorious than Mr. Bentaleb for the six available posts in the Department. We see no issue here whatsoever.

5. The second point raised by the Panel concerns the fact that I, the Head of the Department, reassigned a P-5 staff laterally to Mr. Bentaleb's Division, thereby blocking (in the Panel's view) Mr. Bentaleb's promotion prospects. The Panel seems to question here the right of Heads of Departments to effect lateral transfers and in one way or another seems also to imply that Mr. Bentaleb had in effect an 'acquired right' to the P-5 in his Division, which right has been abrogated by the lateral transfer. Here again we see no validity in the Panel's position. Nobody has a 'right' to a post and no one can justifiably claim that any lateral reassignment would effectively block one's promotion opportunity for somebody. My reasons for the particular lateral reassignment in question were entirely substantive and called for. I would have made it even if the internal review panel had not recommended it to me but, as it happened, even the internal panel had the same idea. So, again, there is no issue here.

6. We therefore see no element of unfair or discriminatory treatment of Mr. Bentaleb in the Department and find no substantive validity in the Panel's report. The case boils down to the fact that two authoritative promotion review bodies have not selected Mr. Bentaleb for promotion against an available post. In that, the case has no more in it than what numerous other staff in the Department and throughout the Organization have often encountered."

While the work of the Panel on Discrimination was in progress, the Applicant had, on 27 August 1987, sent to the Chairman of the Appointment and Promotion Board a memorandum of recourse in which he argued that, since Mr. Argyriades was already at the P-5 level and therefore did not require a new P-5 post for his promotion, there was a P-5 post available for the promotion of the Applicant. On 18 December 1987 the Assistant Secretary-General for Human Resources Management informed the Under-Secretary-General of DTCD that the 1986 promotion recourse review was about to be finalized and that the Applicant's name was likely to be added to the P-5 Promotion Register; he asked him whether he could confirm that a post was available in the appropriate unit or office to implement such a promotion, should the Applicant's name appear on the Register. On 23 December 1987 the Under-Secretary-General of DTCD replied that there was no vacant post at the P-5 level in the Department. On 6 April 1988 the Chairman of the Appointment and Promotion Board informed the Applicant that, notwithstanding the additional information presented in his memorandum of recourse, the Board's re-examination of his case had not revealed that there had been an omission so significant as to afford grounds for amending its previous decision. On the same day an addendum to the 1986 Senior Officer (P-5) Promotion Register was issued. The Applicant's name was not included in the addendum.

After an exchange of correspondence in which he requested clarification regarding the decision of the Appointment and Promotion Board from the Chairman of the Board and from the Assistant Secretary-General for Human Resources Management, the Applicant filed a preliminary statement of appeal with the Joint Appeals Board on 29 April 1988. On 4 May 1988 he requested the Secretary-General to review the administrative decision not to include his name in the 1986 P-5 Promotion Register. On 15 July 1988,

having received no reply to his request, he filed a full statement of appeal with the Joint Appeals Board. The Board submitted its report on 29 November 1988. The conclusions and the recommendation of the Board read as follows:

> "Conclusions and Recommendation
>
> 54. The Panel concludes that the Administration was not obliged to follow the recommendation of the APB [Appointment and Promotion Board] to place the appellant on the 1986 promotion register.
>
> 55. The Panel concludes that the appellant had not sustained the burden of proving his allegations of discrimination and conspiracy and that there was no evidence that he had been treated unfairly.
>
> 56. The Panel concludes that the confidentiality of the APB process had not been observed at a stage when it was still necessary and that at a later stage when it appeared no longer essential, this confidentiality had been invoked to deny the appellant information in which he had a legitimate interest.
>
> 57. The Panel recommends that in future promotion exercises - or whatever processes take their place - confidentiality be strictly observed where necessary but that staff members be given full and correct answers to legitimate questions where essential confidentiality does not preclude it.
>
> 58. The Panel makes no other recommendation in favour of the appeal."

On 6 December 1988 the Under-Secretary-General for Administration and Management informed the Applicant that, having re-examined his case in the light of the Board's report, the Secretary-General had decided to maintain the contested decision. On 29 June 1990 the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. No up to date performance evaluation report concerning the Applicant was available either to the Departmental Panel or to the Appointment and Promotion Board.

2. The Departmental Panel was not competent to recommend lateral inter-divisional transfers of staff.

3. The finding by the Panel on Discrimination that the Applicant had been subject to discriminatory treatment placed an especially heavy burden on the Administration to provide a prompt and effective remedy, an obligation which the Administration has failed to meet.

4. The availability of a post was not a pre-condition for promotion.

Whereas the Respondent's principal contentions are:

1. The Applicant has no right to promotion but only to consideration for promotion. The Applicant was properly considered for promotion.

2. The availability of a post was an integral part of the 1986 promotion review.

3 There is no credible evidence of improper motivation leading to the decision of the Appointment and Promotion Board not to include the Applicant's name in the 1986 Promotion Register, or in the Secretary-General's acceptance of that Register.

The Tribunal, having deliberated from 22 October to 4 November 1991, now pronounces the following judgement:

I. In his pleas, the Applicant contests the decision not to include his name in the 1986 Senior Officer (P-5) Promotion Register and requests the Tribunal to decide that his name be added to that Promotion Register and that his promotion be implemented retroactively as of 1986.

The Applicant claims that during the various stages of the review process, his promotion did not receive the fair and objective consideration to which he was entitled according to the applicable rules, and that the process was flawed by discrimination and other irregularities.

The Respondent, while recognizing the Applicant's right to consideration for promotion, asserts that the Applicant was properly considered.

II. While recognizing the principle that promotions are subject to the discretion of the Secretary-General, the Tribunal has also considered that the rules and procedures regulating the promotion process contain safeguards to ensure fairness and objectivity in a process which is vital to staff members. Accordingly, the Tribunal has stressed that these rules and procedures are part of the conditions of service of staff members and should therefore be respected, correctly interpreted and properly applied. Moreover, in Judgement No. 470, Kumar (1989), paragraph IV, the Tribunal recalled that although it cannot substitute its judgement for that of the Administration concerning the standard of performance or efficiency of a staff member, it is competent to pass judgement upon applications alleging non-observance of pertinent regulations and rules or alleging prejudice or improper motivation.

III. Having said this, the Tribunal will examine whether the various steps of the promotion process were conducted improperly to the Applicant's detriment, as alleged by the Applicant.

IV. The Tribunal notes that the 1986 promotion exercise was initiated by the Assistant Secretary-General for Personnel Services through a memorandum of 3 February 1986 addressed to all heads of Departments and Offices in which he requested them to submit their recommendations for consideration by the Appointment and Promotion Board and its subsidiary bodies.

Paragraph 2 of this memorandum read in part:

> "As in the past, Departments and Offices are required to ensure the existence of suitable procedures to conduct their internal promotion review in a fair and objective manner for the purpose of establishing the departmental list." (emphasis added)

In implementation of that paragraph, DTCD established a panel to conduct its internal promotion review.

V. The Applicant states that, in conversations in March and April 1986 with the Chief of TARAS and the Director of PSD, he was promised that, considering the high level of his work performance and his seniority, he

would be put in charge of Unit II of TARAS when its Chief retired at the end of August, with a recommendation for promotion to P-5. Such a recommendation was indeed made to the Executive Office of the Department.

VI. The Departmental Panel did not endorse the recommendation for the P-5 post referred to above but proposed instead that Mr. Argyriades, a staff member of another division of DTCD who was already at the P-5 level, should be transferred to that post. On 28 August 1986, the Director of PSD made an appeal to the Under-Secretary-General of DTCD to review that proposal in view of its possible negative effect on the morale of the Applicant and possibly of other staff in TARAS. His appeal was unsuccessful.

VII. In view of the positive recommendation of the head of his division, his very good performance as documented in his service record, the favourable evaluation of his work by chiefs of service from other divisions, and his long seniority, the Applicant considered that the action of the Departmental Panel in rejecting his candidacy for promotion was unfair and discriminatory.

VIII. The Applicant challenges the validity of the recommendation of the Departmental Panel on the following grounds:

(a) The absence of an up-to-date performance evaluation report, which was aggravated by an improper evaluation of his work performance by the Departmental Panel; and

(b) An "excess of competence" (ultravires action) on the part of the Departmental Panel in recommending a transfer.

The Tribunal will now examine these contentions.

IX. According to the Applicant, the Departmental Panel considered his promotion in the absence of an up-to-date performance evaluation report. The Applicant rightly complains that he was not provided with a performance evaluation report for almost five years, not even upon the retirement of his immediate superior. The Tribunal considers that such a failure on the part of the Administration constitutes, in itself, an inexcusable violation of paragraphs 4 and 5 of Administrative Instruction ST/AI/240/Rev.2.

X. The failure to observe this important procedural requirement is even more serious when it affects consideration for promotion. Here the Applicant's most recent performance evaluation report at the time he was considered for the P-5 post at the departmental level in 1986 related to a period ending in June 1982. The Respondent tried to minimize the impact of lack of a recent performance evaluation report by saying that there were several performance evaluation reports covering the period from November 1971 to June 1982 in the Applicant's files.

The Tribunal considers the Respondent's argument inadequate for two reasons.

1. Besides the fact that paragraph 2 of Administrative Instruction ST/AI/240/Rev.2 emphasizes the importance of a "periodic evaluation system" as a basis for a "comprehensive career development system which includes ... opportunities for advancement", paragraph 2 of the memorandum dated 3 February 1986 of the Assistant Secretary-General for Personnel Services is explicit in this regard. It states that "All participants [in the internal promotion review] should be provided with all documentation relevant to the promotion review" including "up-to-date ... performance evaluation reports".

2. The Tribunal notes that the four years preceding the Applicant's consideration for promotion in 1986 by the Departmental Panel were a crucial period and that a timely assessment of his performance was therefore essential. Indeed, a reading of the performance evaluation report subsequently made for that period reveals very pertinent and positive elements substantiating the qualifications, abilities, resourcefulness and performance of the Applicant. Among these elements, the performance evaluation report in question noted that, following the retirement of the former chief of Unit II of TARAS, the Applicant served as Officer-in-Charge. This was of special importance in view of the Applicant's statement that, during recent years, he had at other times been designated Officer-in-Charge of Unit II when the Chief was on leave.

XI. In a tight competition between several candidates for a limited number of vacant posts, all evaluations, especially recent ones in favour of the staff member, ensure a fair and objective appraisal of his or her

performance and provide a basis for advancement. The Applicant was unfairly deprived of this opportunity in violation of his right to fair treatment.

XII. The absence of an up-to-date performance evaluation report was compounded by another irregularity committed by the Departmental Panel. Although at a later stage the Respondent did not question the qualifications of the Applicant, the file indicates that the Departmental Panel apparently had formed a negative judgement on the Applicant's work performance when it concluded that another staff member would be a better choice to fill the P-5 post vacated by the Chief of Unit II of TARAS. When the Panel on Discrimination and Other Grievances made inquiries as to justification for the conclusion reached by the Departmental Panel notwithstanding the recommendation of the Applicant's superiors, it found only innuendos and no concrete reasons or tangible evidence.

XIII. The Applicant took exception to the action of the Departmental Panel from another angle. He questioned the legality of its action in recommending the transfer of another staff member, already at the P-5 level, to the P-5 post for which the Director of PSD had recommended the Applicant. The Applicant argued that the Departmental Panel, in doing so, had exceeded its terms of reference. The Respondent's answer is that, in the memorandum of the Assistant Secretary-General for Personnel Services dated 3 February 1986 describing the mandate of the departmental panels with regard to the 1986 promotion exercise, there is no provision limiting the authority of the departmental panels solely to recommendations for promotion and excluding the possibility of transfers of staff members.

XIV. The Tribunal is unable to accept that argument for the following reasons:

First, the memorandum dated 3 February 1986 dealt exclusively with promotion. The title of the memorandum was "The 1986 Promotion Exercise". The memorandum addressed promotion requirements, their importance, different kinds of promotion - i.e., normal and accelerated - and the modalities for promotion. The memorandum also highlighted some General Assembly resolutions pertinent to promotion.

Secondly, the memorandum defined the composition of the organ which was to conduct internal promotion reviews, in this instance, the Departmental Panel. Paragraph 2 of the memorandum requested promotion panels to conduct the internal promotion reviews in a fair and objective manner for the purpose of establishing the departmental list. Nowhere in the memorandum is the possibility of a recommendation for transfer mentioned. Moreover, a lateral transfer which, in effect, may block promotion, as it did here, is contrary to the raison d'être of a promotion panel.

XV. The Tribunal therefore finds that the Departmental Panel's recommendation for a lateral transfer to the P-5 post for which the Applicant had been recommended by his superior also constituted unfair treatment. At the same time, however, the Tribunal is unable to conclude that this was a discriminatory measure taken in bad faith against the Applicant alone as a pretext for depriving him of an opportunity for promotion. An examination of the report of the Departmental Panel discloses that the Panel also considered the possibility of transfer with respect to other posts. Furthermore, the absence of any animus against the Applicant is shown by the fact that four other candidates were also affected by the lateral transfer.

XVI. The Tribunal accordingly holds that, in the departmental review, the Applicant did not receive the full, fair and objective consideration to which he was entitled, and that the applicable rules were violated in his case.

XVII. The Applicant claims that the consideration of his promotion at the level of the Appointment and Promotion Board was also marred by serious irregularities. The Tribunal will review the steps taken with respect to the inclusion of the Applicant's name in the 1986 P-5 Promotion Register in order to see whether any impropriety was committed.

XVIII. The Tribunal notes in this regard the following:

1. The Applicant's department did not recommend him for promotion and his name did not appear on the 1986 P-5 Promotion Register prepared by the Appointment and Promotion Board and issued by the Secretary-General on 17 June 1987.

2. On 27 August 1987 the Applicant availed himself of the recourse procedure to appeal against the non-inclusion of his name in the Register. He specifically argued that, since the staff member transferred to TARAS was already at the P-5 level and therefore did not require a P-5 post for his promotion, a P-5 post was available for the Applicant's promotion. The Applicant also submitted statistical information for the full year 1986 which showed that his output in appointments of project personnel exceeded that of his colleagues.

3. On 6 April 1988, an addendum to the 1986 P-5 Promotion Register was promulgated and the Applicant's name was again not included in it.

On the same day, the Applicant was informed by the Chairman of the Appointment and Promotion Board that his recourse had been unsuccessful. In his letter, the Chairman of the Board stated the following:

(a) The Applicant's recourse had been placed before the Appointment and Promotion Board, which gave it full consideration;

(b) Notwithstanding the additional information presented, the Board's re-examination of the Applicant's case did not reveal that there had been an omission so significant as to afford grounds for amending the Board's previous recommendation.

XIX. In fact, the letter of 6 April 1988 from the Chairman of the Appointment and Promotion Board did not accurately describe what had actually occurred. The Applicant's recourse of 27 August 1987 had been successful. The Board had found merit in the recourse and had added the Applicant's name to the 1986 P-5 Promotion Register, which had been recommended to the Secretary-General for approval. In the Tribunal's view, the recourse procedure before the Appointment and Promotion Board is, for obvious reasons, an important safeguard in connection with a staff member's

right to be considered fairly for promotion. Not revealing to the Applicant the truth about the fate of his recourse was a serious irregularity, detrimental to the Applicant's right to seek proper redress.

XX. After learning that the Appointment and Promotion Board had included his name in the Promotion Register but that his promotion had been opposed by the Assistant Secretary-General for Human Resources Management and the Under-Secretary-General of DTCD, the Applicant, on 18 and 19 April 1988 respectively, wrote to the Assistant Secretary-General for Human Resources Management and to the Chairman of the Appointment and Promotion Board stating that he had reason to believe that the Board had indeed put forward his name for inclusion in the Promotion Register, but that the Office of Human Resources Management had rejected that recommendation on the basis of a lack of an available post in DTCD. The Applicant urgently requested clarification with respect to these matters.

XXI. On 20 April 1988, the Chairman of the Appointment and Promotion Board replied to the Applicant's memorandum of 19 April 1988 stating that:

> "As you may know, the functions of the [Appointment and Promotion] Board are advisory in nature and its deliberations are considered confidential. Nevertheless, I can confirm to you that notwithstanding any position taken by the Board to recommend or not to recommend your promotion, the final decision was not to include your name in the 1986 P-5 Promotion Register."

XXII. This answer involved a serious irregularity. The Chairman of the Appointment and Promotion Board, having another opportunity to reveal to the Applicant the true fate of his recourse, did more than merely invoke the privilege of confidentiality. His words tended to create the impression that the Applicant's recourse had failed at the level of the Board. The Chairman of the Board knew that it was the Respondent who had deleted the Applicant's name from the 1986 P-5 Promotion Register after it had been added there by the Board. In the view of the Tribunal, the language of the above communication does not satisfy the principle of good faith which should govern the relations between the Administration and members of the staff.

XXIII. Indeed, the Respondent emphasized before the Joint Appeals Board that the Appointment and Promotion Board, at the recourse stage, had not rechecked the post availability situation but had recommended the addition of the Applicant and another DTCD staff member to the P-5 Promotion Register. The Assistant Secretary-General for Human Resources Management again checked with DTCD and, having been informed that no posts were available, did not accept the recommendation of the Appointment and Promotion Board as regards the Applicant. The Tribunal notes that the same sequence of events occurred as described in Judgement No. 495, Castellanos (1990), paragraphs X and XV, and entailed the same breach of confidentiality. The Respondent further asserted before the Joint Appeals Board that the Assistant Secretary-General for Human Resources Management had acted properly in not accepting the recommendation of the Appointment and Promotion Board to add the Applicant's name to the original register upon realizing that a vacant post was not available to implement the promotion.

XXIV. With regard to this final stage of the promotion process, the Tribunal finds as follows:

During the recourse procedure, the Appointment and Promotion Board, having received an up-to-date performance evaluation report on the Applicant and having taken cognizance of the report of the Panel on Discrimination and Other Grievances, was able to assess fairly and objectively the qualifications of the Applicant. It corrected the situation by including the Applicant's name in the Promotion Register. It thus overruled the prior negative assessment with regard to the Applicant's qualifications and at that stage was evidently satisfied that there was a vacant P-5 post.

XXV. However, instead of acquiescing in the fair and objective consideration by the Appointment and Promotion Board during the recourse procedure, the Respondent decided that the requirement of the availability of a post had not been met.

XXVI. Without doubt, the availability of a post was a requirement for the promotion. Nevertheless, the Tribunal finds, for the reasons set forth in

paragraphs XIII-XV above, that invoking that requirement after the Appointment and Promotion Board initially seemed to have satisfied itself on that score had the effect of compounding the unfair treatment of the Applicant discussed above. This is all the more so since the Respondent concedes that several staff members were added to the 1986 Promotion Register with the knowledge that there might not be available posts.

XXVII. The Tribunal recalls its Judgement No. 411, Al-Ali (1988), paragraph III, in which, while recognizing the principle that promotions are subject to the discretion of the Secretary-General, the Tribunal stated:

> "... staff members are promoted regularly according to an elaborate process governed by rules and procedures laid down in article 104.14 of the Staff Rules and related Secretariat issuances. These rules and procedures ... also contain safeguards to ensure fairness and objectivity in a process which is vital to the life of a staff member.
>
> The Tribunal considers that these rules and procedures are part of the conditions of service of staff members, and therefore they should be respected, correctly interpreted and properly applied, as long as they are in force."

The Tribunal also recalls its Judgement No. 495, Castellanos (1990), paragraph IV stating:

> "Moreover, the exercise by the Secretary-General of his discretionary power to approve or to disapprove the recommendations of the APB must not be tainted by forms of abuse of power (détournement de pouvoir) such as lack of due process, violation of the principle of good faith in dealing with staff members, prejudice or arbitrariness or other extraneous factors which may flaw his decision."

XXVIII. The Tribunal considers that the totality of what occurred in this case engages the responsibility of the Respondent and entails compensation for all the injury sustained by the Applicant. The Tribunal fixes this compensation at the amount of $ 35,000.

XXIX. Since the Tribunal has concluded that the Secretary-General's exercise of discretion in disapproving the recommendation of the Appointment

and Promotion Board for the Applicant's promotion was flawed for the reasons stated above, the Tribunal trusts that the Applicant will now receive from the Respondent the full and fair consideration to which he is entitled for promotion, at the earliest possible date, to a vacant P-5 post for which he is qualified, particularly in view of the unfair treatment to which he was subjected.

XXX. For the foregoing reasons, the Tribunal:

1. Orders the Respondent to pay compensation to the Applicant in the amount of $35,000.

2. Rejects all other pleas of the Applicant.

(Signatures)

Roger PINTO
President

Jerome ACKERMAN
First Vice-President

Ahmed OSMAN
Second Vice-President

New York, 4 November 1991

Jean Hardy
Acting Executive Secretary